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in the Supreme Court of the United States

CASE NO. 75-1352

BEHRING CORPORATION,
a Delaware corporation,

Petitioners,

vs.

WILLIAM R. BENNETT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

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A.

OPINIONS BELOW

The Petitioners, BEHRING CORPORATION, a Delaware corporation, seek a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit in the case of WILLIAM R. BENNETT, et al., Plaintiffs, Appellees vs. BEHRING CORPORATION, a Delaware corporation, Defendant, Appellant [case no. 74-3055] 5 Cir. 1976, 525 F.2d 1202. Petitioner has not sought a rehearing or a rehearing en banc. The decision of the Fifth Circuit dismissed Petitioner's appeal for lack of jurisdiction. The Fifth Circuit held it lacked jurisdiction to review an order dated January 16, 1976 entered by the United States District Court in and for the Southern District of Florida which certified a class and subclass.

Copies of the following decisions, opinions, and judgments are appended hereto:

Appendix A — Order of United States District Court, in and for the Southern District of Florida certifying Respondents class and subclass dated July 3rd, 1974.

Appendix B — Opinion of United States Court of Appeals for the Fifth Circuit, dated January 16th, 1976.

B.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit herein (Appendix B, infra page 13) was entered on January 16, 1976. No petition for rehearing was filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C., §1254; and 28 U.S.C., §2101(c); and Supreme Court of the United States, Revised Rules, Effective July 1, 1970, Rule 19(1)(b); Rule 21; Rule 22(3). The decision of court of appeals has decided a federal question in a way in conflict with the following applicable decisions of this court:

1. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 5411, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

2. *Gillespie v. United States Steel Corporation*, 379 U.S. 200, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

3. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

The court of appeals has rendered a decision in conflict with the decisions of other court of appeals on the same matter, viz:

1. *Herbst v. International Telephone and Telegraph Company*, 495 F.2d 1308 (2nd Cir. 1974).

2. *Ott v. Speedwriting Publishing Co. and I.T.T.*, 518 F.2d 1143 (6th Cir. 1975).

3. *Cessna Aircraft Distributorship Anti-Trust Litigation v. Cessna*, 518 F.2d 213 (8th Cir. 1975).

4. *Siebert v. Great Northern Development Co.*, 494 F.2d 510 (2d Cir. 1975).

5. *Parkinson v. April Industries*, 520 F.2d 650 (2d Cir. 1975).

6. *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974).

7. *General Motors v. The City of New York*, 501 F.2d 639 (2d Cir. 1974).

In the alternative to the above, the court of appeals has decided an important question of federal law which has not been, but should be, settled by this court. The court of appeals has determined categorically that it has no jurisdiction to review a district court order certifying class status—not that the collateral order rule or the tests applied by this court and other circuits does not apply. Hence, the court of appeals has erroneously decided an important federal question by concluding that irrespective the prejudice, delay, vagueness or confiscatory nature of the order below, no jurisdiction to review exists.

C.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner asserted below that the United States Court of Appeals for the Fifth Circuit is vested with jurisdiction pursuant to 28 U.S.C.A. §1291 to determine upon the merits whether the United States District Court for the Southern District of Florida erred in certifying class status.

Petitioner respectfully urges that the United States Court of Appeals for the Fifth Circuit erred in dismissing Petitioner's appeal and in failing to apply the collateral order doctrine as developed under 28 U.S.C.A. §1291 to the facts of the instant case. There is direct conflict on the same point of law between prior decision of this court, other courts of appeals and the decision of the Fifth Circuit in the instant case.

The record herein affirmatively states that the order of the United States District Court for the Southern District of Florida certifying Respondents class action status is an appealable order under 28 U.S.C.A. §1291 in that there has been a final determination of claim of right which is separable from, and collateral to, rights asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case has been adjudicated.

D.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Respondents brought the diversity class action complaint on June 6, 1972 in the United States District Court for the Southern District of Florida. Respondents alleged jurisdiction pursuant to 15 U.S.C. §1719, 28 U.S.C. §2201, 28 U.S.C. §2202 and 28 U.S.C. §1332. Respondent alleged damage in excess of $10,000.00. Subsequently the Trial Court found and issued the order dated July 3rd, 1974 stating that jurisdiction was based solely upon 15 U.S.C. §1332.

E.

QUESTIONS PRESENTED FOR REVIEW ON MERITS

I. WHETHER COURT OF APPEALS IMPROPERLY DISMISSED PETITIONER'S APPEAL.

II. WHETHER COURT OF APPEALS ERRED IN HOLDING THAT THE ORDER OF THE DISTRICT COURT IS NOT A FINAL APPEALABLE ORDER UNDER 28 U.S.C. §1291.

F.

STATUTES INVOLVED

1. 28 U.S.C. §1291:

The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12(e), 72 Stat. 348.

2. Federal Rule of Civil Procedure 23:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(3) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

G.

STATEMENT OF THE CASE

1. Proceedings Below:

The Plaintiffs (respondents here), WILLIAM R. BENNETT, WALTER L. GALLOWAY, LILLIAN GALLOWAY, AL A. JURSEK, ROSE J. JURSEK, ALEXANDER J. WAGNER, I JCILLE G. WAGNER, and VICTORIA L. WAGNER (hereinafter referred to as BENNETT), brought suit against the Defendant (petitioner here) BEHRING CORPORATION, a Delaware corporation (hereinafter referred to as BEHRING), in the United States District Court, in and for the Southern District of Florida, for damages and equable relief. Plaintiffs filed a multi-count complaint as follows:

Count I — Fraud and Misrepresentation

Count II — Removal of Deed Restrictions

Count III — Specific Performance

Count IV — Damages

Count V — Interstate Land Sales Act Violation

Count VI — Punitive Damages

Count V has been dismissed. Counts II, III, and IV have been held to be the proper subject for class action prosecution by an order of the District Court dated July 3, 1974 (A. 214-220).[1]

[1]All references to appendix refer to the appendix filed with the United States Court of Appeals for the Fifth Circuit.

The District Court certified a class under Count II and defined that class as follows: (A. 219).

> All those persons who reside, or will in the future reside within the corporate limits of the City of Tamarac, Broward County, Florida, and who have purchased, or will in the future purchase property located in the City of Tamarac from the Defendant BEHRING CORPORATION, or who are or will be obligated to make any payments under any Declarations of Restrictions which have been filed by the Defendant BEHRING CORPORATION, or its subsidiaries and which purport to apply to properties located within the corporate limits of the City of Tamarac.

The District Court certified a subclass under Counts III and IV and defined that subclass as follows: (A. 219).

> All those persons who reside within the corporate limits of the City of Tamarac, Broward County, Florida, and who have purchased property from the Defendant, BEHRING CORPORATION and who entered a contract with the defendant containing a covenant to supply the purchaser with a "warranty deed conveying title free and clear of all encumbrances".

Both classes were certified under Federal Rule of Civil Procedure 23(b)(3).

Petitioners appealed the class certification to the United States Court of Appeals for the Fifth Circuit. The

United States Court of Appeals for the Fifth Circuit dismissed the appeal by its per curiam order of January 16, 1976. This petition followed.

2. The Facts Shown Below:

> By Contract for Purchase and Sale, the Bennetts and other members of the class agreed to purchase homes in a platted subdivision of Broward County, Florida known as The Mainlands of Tamarac Lakes—Third Section.
>
> The Wagners agreed to purchase a home in the subdivision known as The Mainlands of Tamarac Lakes—Fifth Section. (A. 27).

The Bennetts closed and received a Warranty Deed excepting "restrictions, reservations and servitudes", recorded in the Official Records of Broward County Book 3620, Pages 727-734. (A. 41).

The Wagners' Deed excepted "restrictions, reservations and servitudes", recorded at Book 3779, Pages 676-684. (A. 29).

The Bennett subdivision consists of 256 homes while the Wagner subdivision contains 265 homes. The Bennett restrictions apply only to their subdivision. The Wagner restrictions apply only to their subdivision.

The Bennetts and the Wagners occupied the houses and apparently still own this property.

The respective Declarations of Restrictions (A. 30 and A. 42) pertain to a variety of subjects, viz:

1. Residential Use.

2. No Trade, Business or Profession, Etc.

3. Lawns, Landscaping, Fences, Hedges, Clothes Poles, Exterior Radio and Television Antennas, Parking, Hurricane or Storm Shutters.

4. Age Limitation on Permanent Residents.

5. Reservations for Lawn, Sprinkler System and Exterior Building Maintenance, Etc.

6. Recreation Facilities; Operation and Maintenance, Lien for Costs, Etc.

7. Recreation Land Lease; Liability For, Assignment Lien, Etc.

It is clear from the Complaint (A. 8-22) that Plaintiffs complain only of the provisions of Paragraphs 6 and 7 of the restrictions, and that Plaintiffs' position is based entirely upon the argument that the requirement for an "affirmative act" (payment) renders sections 6 and 7 void and, hence, the proper subject of a rescission action.

The District Court has certified as a class all persons who have purchased from Defendant who are obligated to make payments under Declarations of Restrictions. The purpose being to adjudicate Plaintiff's claim for rescission of paragraphs 6 and 7 of the Restrictions. As a subclass,

the District Court designates all who executed purchase contracts calling for delivery of deeds "free and clear" of all encumbrances and who, in fact, received (and presumably accepted) deeds referring to and subject to recorded reservations.

It is from this certification that Petitioner appeals.

3. The Findings of the Trial Court:

The findings of the trial court are clearly set forth by its order of July 3, 1974 which states in part as follows:

> The court specifically finds that the allegations in Count II as to the legality of the deed restrictions (Paragraphs 22, 23, 24, 25) constitute a Rule 23(b)(3) class action as to the particular legal issues presented and that the allegations of contract breach in Counts III and IV constitute an appropriate subclass under Rule 23(b)(3) of which the Bennetts are proper class representatives. The court also finds that a trial of the issues under Count III and Count IV may be separated from a trial of the specified issues under Count II.
>
> The court has determined that pursuant to Rule 23(a)(1) the class under Count II and the subclass under Counts III and IV are so numerous that joinder of all members is impracticable. The number of Tamarac homeowners are approximately 10,000 and all homeowners are potentially class members under Count II. Although the court is unaware of the number of homeowners consti-

tuting the subclass of all those who received contracts promising to convey title free and clear of all encumbrances, the court at this time assumes that the number exceeds fifty so that joinder of all parties would be impracticable. Cf., *Moscarelli v. Stamm*, supra at 463. Under 23(a)(2), the court finds that there are questions in common predominate over any individual questions of fact. Under Count II, the claim that the deed restrictions are void because of the affirmative nature of the obligations and because of the restraints on alienation is a legal question common to every homeowner in Tamarac who has a similar Declaration of Restriction as an encumbrance on his or her title. Under Count III and the alternative Count IV, the common questions involving contract construction predominate. In addition, the defendant's defense of merger are defenses that could be raised against any member of the subclass.

Finally the court finds under 23(a)(3) and (4) that the plaintiffs are proper class representatives and that the Bennetts are proper subclass representatives as each named plaintiff is currently a homeowner in Tamarac possessing title with the encumbrances complained of and that each named plaintiff is the original purchaser of the subject property. The Bennetts as subclass representatives were recipients of the form contract providing for the delivery of a warranty deed "free and clear" of all encumbrances.

Therefore, for the foregoing reasons it is

ORDERED AND ADJUDGED that:

1. The allegations of common law fraud contained in Counts I and VI of the complaint cannot be maintained as a class action under Rule 23, F.R.C.P. and the motion for determination of class is denied as to those counts.

2. A class action under Rule 23(b)(3) as to the allegations contained in paragraphs 22, 23, 24, and 25 of Count II is hereby certified as to the issues contained therein and the class is defined as:

> All those persons who reside, or will in the future reside within the corporate limits of the City of Tamarac, Broward County, Florida, and who have purchased, or will in the future purchase property located in the City of Tamarac from the Defendant BEHRING CORPORATION, or who are or will be obligated to make any payments under any Declarations of Restrictions which have been filed by the Defendant BEHRING CORPORATION, or its subsidiaries and which purport to apply to properties located within the corporate limits of the City of Tamarac.

3. A subclass under Rule 23(b)(3) is hereby certified as to Counts III and IV of the complaint and the subclass is defined as:

> All those persons who reside within the corporate limits of the City of Tamarac, Broward County, Florida, and who have purchased property from the Defendant, BEHRING CORPORATION and who entered a contract with the defendant containing a covenant to supply the purchaser with a "warranty deed conveying title free and clear of all encumbrances."

4. The motion for a separate trial as to Counts III and IV is hereby granted.

5. The plaintiff is directed pursuant to Rule 23 (c)(2) to submit to the court for approval a proposed form of notice to the class and proposed method of effecting notice to fulfill the requirements of Rule 23(c)(2) and the recent dictates of the Supreme Court in *Eisen v. Carlisle*, 42 LW 4804 (May 28, 1974) designed to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Plaintiff shall submit the proposed notice and proposed method of notice within forty-five (45) days of the date of this order.

4. The Opinion of the Fifth Circuit:

The United States Court of Appeals for the Fifth Circuit dismissed the petitioners appeal.

The Fifth Circuit held that the order entered by the District Court was not a final appealable order under 28 U.S.C. §1291.

H.

REASONS FOR GRANTING THE WRIT

The order of the trial court shows that the relief sought by the Plaintiff below will affect ten thousand separate real estate transactions on a class basis. These transactions began after the incorporation of the City of Tamarac, Florida in 1963 and extend to the present and will extend on into the future without end in time. No exception to the class definition is made for second, third or fourth generations of owners of the disparate pieces of real estate who have had no contact with the developer whatsoever. The effort to selectively rescind a portion of the transaction related to payment for recreational facilities could have a monetary impact in excess of 60 million dollars.

Nothing could be more confiscatory, inequitable or inconsistent with the intent of Federal Rule of Civil Procedure 23.

There must, in so exceptional a case, be at least a narrow corridor for review of a trial court order finding class status.

The opinion of the court of appeals categorically rejects review of orders fixing class status and is in conflict with the decisions of this court and other circuits.

We respectfully urge that, absent review and reversal, the opinion of the court of appeals presents substantial "danger of denying justice by delay". *Eisen v. Carlisle & Jacqueline, et al.*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

Stated simply, the District Court has certified as a class all persons who have purchased from Defendant who are obliged to make payments under declarations of restrictions. The purpose being to adjudicate Plaintiffs' claim for rescission of Paragrpahs 6 and 7 of the restrictions.

As a subclass, the District Court designated all who executed purchase contracts calling for delivery of deeds "free and clear" of all encumbrances and who, in fact, received (and presumably accepted) deeds referring to and subject to recorded reservations.

It is, we believe, not disputed that the Bennetts, the Wagners and likely all purported class members knew that a regular monthly payment was required for the recreational facility (depositions of Bennetts (A. 268-271, 275-280, 296, 291, 315-318, 328, 339, 340). (See Also: The Contracts for Purchase and Sale, "Purchaser agrees to pay $33.00 (approx.) monthly maintenance and recreation facility charge to the Seller, or the City of Tamarac or Assigns".) (A. 27, 39).

Based on the record before it, the trial court found:

> The number of Tamarac homeowners are approximately 10,000 and all homeowners (even those with actual notice of deed restrictions and those who did not purchase from Behring Corporation) are potentially class members under Count II. (A. 218).

The Declarations of Restrictions provide for $10.00 per month per subdivision lot as ground rent on the recreational parcel. (A. 35, 46). On a monetary basis alone the

loss of ground rent from 10,000 potential class members would be the product of $10.00 × 12 months × 50 years (to 2018 A.D.) × 10,000; or $60,000,000.00.

Based upon the potential loss calculated from the conclusions reached in the order of July 3, 1974, coupled with Defendant's right to equal treatment, we urge that this Court undertake to review this matter with the same degree of liberality as accorded class plaintiffs under the "death knell" theory.

The trial court order of July 3, 1974 does "finally determine collaterial rights too important to be denied review and too independent of the cause itself to postpone appellate review". *Siebert v. Great Northern Development Co.*, 494 F.2d 510.

The District Court's order "certifies" Plaintiffs' right to represent a class of 10,000 persons who fit only two requisites:

a) Purchasers from defendant who are,

b) obliged to make payments under Declarations of Restrictions.

There is no beginning point or ending point in time. The adjudication of the claim of the defined class purports to predetermine the rights and obligations of all purchasers and the Defendant for all transactions "in the future".

The class definition as stated, purports (by the phrase "or who are or will be . . .") to adjudicate the rights of *subsequent* purchasers (not from Defendant) and the rights of Defendant's assigns.

Mindful of the rule that class determination is not to be predicated upon the likelihood that a potential class will be successful, we know of no clearer proof of prejudice and economic waste to the Defendant than the burden of defending the defined class under Count II.

The sole, the only, substantive basis upon which Plaintiffs purport to state a cause of action for the only relief sought by the defined class—rescission—is the argument that restrictions imposing affirmative obligations are invalid. In Florida, there is not the slightest possibility that Plaintiffs' theory is viable. It is settled law that charges imposed by restrictive covenants, squarely as apply here, are enforceable. See: *Point East Management Corp. v. Point East One Condominium Corporations*, 258 So.2d 322; *Sloane v. Dixie Gardens*, 278 So.2d 309; *Wood v. McElvey*, 296 So.2d 102; *Japanese Gardens Mobile Estates v. Hunt*, 261 So.2d 193; *Hagen v. Sabal Palms*, 186 So.2d 302; *Tri Par Land Dev. Co. v. Henthorn*, 241 So.2d 429.

The Supreme Court's endorsement of a "practical rather than a technical construction" of §1291 as noted in *Eisen*, supra, together with "equality of treatment as between plaintiffs and defendants" promote recognition of the reviewability of the Appellate Court's order here.

Plaintiffs Bennett and Wagner live in subdivisions containing 256 and 265 homes, respectively. There is a recreation hall with recreational facilities and parking in each section. There are many other such subdivisions, each with its own recreation facility. *No* section has any interest in *or obligation* of any type related to the recreational facility *of any other section.* Under Paragraph 6 of the Restrictions (A. 33 and A. 45), the Bennetts and the Wag-

ners are obligated to pay a reasonable amount as their proportional share of the cost of the maintenance of the recreational facility. Under Paragraph 7, they pay $10.00 per month as ground rent. (They make no assertion that charges have been unreasonable or that the facility is any less than satisfactory and available for the use contemplated.)

What the order of July 3, 1974 omits to consider is the patent conflict between those of the 256 or 265 homeowners who seek to avoid payment and the interests of those who use the facility (as do the Bennetts (A. 290, 318) and wish to maintain the recreational program by paying their fair share. Plaintiffs made no assertion that all residents desire the end of the recreational program, hence the District Court's failure to apply Fed. R. Civ. P. 23(a)(4), a prerequisite bearing on adequate class representation, is outside the essential requirements of the law.

Class status, here, is independent of the cause itself. The prejudicial effect of litigating, on a class basis, 10,000 separate real estate transactions is too important to be denied review.

There are five controlling reasons why class action procedure is inappropriate here:

1. There is a conflict of interest between the nominal Plaintiffs and those residents desirous of paying for the recreational facility.

2. Each subdivision has its own recreational facility, and no resident of one subdivision has any interest in or obligation regarding the facility in any other section.

3. The defense of merger (of the contract of purchase into the deed), under Florida law, is a bar to relief absent fraud. Fraud is a reply to the defense of merger which each purchaser would have to establish separately as alluded to in the cogent discussion of fraud in the District Court's order. As fraud does undermine the defense of merger, and fraud cannot be litigated on a class basis, how then can there be adequate representation of the individual rights of purported class members?

4. Plaintiffs seek to have the portion of the Declarations of Restrictions requiring payment of $10.00 per month ground rent on the recreational parcel rescinded, yet make *no allegation* that Defendant is the owner of the recreational parcel *or* has asserted any right to any collection from Plaintiffs or Plaintiffs' purported class. Plaintiffs clearly are not adequately representing other class members where owners of the very subject matter of the litigation (the recreational parcels) are not parties to the action.

5. The nominal Plaintiffs reside in Sections Three and Five, respectively. There are 521 homes in those two sections. The District Court concludes that the class members potentially number 10,000; thus, assuming two persons per house, there are some 38 sections, subject to restrictions unrelated to Sections Three and Five and unrepresented in this action.

As stated in 7 Wright & Miller, Federal Practice and Procedure §1768 at 638 (1972): "It is axiomatic that a putative representative cannot adequately protect the class

if his interests are antagonistic to or in conflict with the objectives of those he purports to represent" and we would add the word "unrelated".

In *Crawford v. Texaco, Inc.*, 40 F.R.D. 381 (S.D.N.Y. 1966), the court held that an action for breach of contract may not be brought on behalf of a class when a number of its members do not assert any breach. In *Crawford*, the Plaintiff, one of twenty-one co-lessors of mineral rights to certain land, attempted to maintain a class action claiming that the Defendant breached a covenant in the lease by entering into an oil drilling pooling agreement with adjacent operations. Some of the co-lessors had continued to accept royalty payments under the lease, were satisfied with the arrangement and asserted no breach. Thus, the interests of the Plaintiff were held to be adverse to those of many members of the class, and the prerequisite of Rule 23(a)(4) was not satisfied.

Similarly, in *Wilkerson v. Coralville*, 478 F.2d 709 (8th Cir. 1973), where a city refused to annex an impoverished residential area consisting of 119 lots, there was a "serious question" as to whether the Plaintiff would fairly and adequately represent the class as some members did not favor annexation. The holding in *Wilkerson* did not include the class action issue, however, since the action was dismissed on the merits.

In the present case, some members of the class which the Plaintiff purports to represent may not favor the course of action which the Plaintiff is demanding, and therefore, under the reasoning of *Wilkerson*, the action cannot be maintained as a class action. But more impor-

tant, the two sections (of 38) represented have no nexus whatsoever with the remaining 36 sections.

In *Hansberry v. Lee*, 311 U.S. 32, 61 Sup.Ct. 115, 85 L.Ed. 22 (1940), the Plaintiff sought to enforce a racially restrictive covenant on behalf of landowners, some of whom wanted the covenant enforced while others wanted to resist its application. The Court found that the action could not properly be maintained as a class action since there was antagonism between the representative and the class members.

On this same point, see *Ward v. Lutrell*, 292 F.Supp. 165 (E.D.La. 1968), where a class action to enjoin the application of a state statute dealing with minimum work hours for women could not be maintained on behalf of all working women in the state since the Court could not "conceive that plaintiffs' position represents the will of many other women workers" who enjoyed the protection of the statute.

Is a class action improper due to varying individual questions of law and fact under Counts III and IV?

Fed. R. Civ. P. 23(a)(2) provides as a prerequisite to maintenance of a class action that there must be questions of law or fact common to the class, and a class action can be maintained under Rule 23(b)(3) only if questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In *Winokur v. Bell Federal Savings and Loan Assn.*, 58 F.R.D. 178 (N.D.Ill. 1972), it was held that Rule 23(a)(2) was not satisfied where all Plaintiffs were savings account holders alleging misrepresentations in violation of the Securities Exchange Act. Since it would have been necessary to examine oral agreements, written advertisements, written agreements, savings and loan charters, telephone conversations and letters to depositors, the questions of fact would have been almost as numerous as the members of the Plaintiffs' class.

Further, in *Bailey v. Sabine River Authority*, 54 F.R.D. 42 (W.D.La. 1971), where the Defendants contracted to sell land to the Plaintiffs, and where substantially the same phraseology was used in the deeds delivered to the various Plaintiffs, a class action could not be maintained under Rule 23(b)(3) for breach of contract since it would have been necessary "to examine the circumstances surrounding each claimant's understanding of the contract".

Likewise, in the present case, it would be necessary to examine the circumstances surrounding *each* claimant's understanding of his contract. Therefore, a Rule 23(b)(3) class action is improper. See also *Bailey v. Romney*, 359 F.Supp. 596 (D.C.D.C. 1973), wherein a class action could not be maintained in an action to enforce a H.U.D. regulation for reimbursement for defects since each individual case would have to be examined.

The order of the District Court concludes that the defense of merger raises questions of law common to all class Plaintiffs. We have pointed out above that this is not necessarily true lest all class Plaintiffs abandon any con-

tention of fraud. Nevertheless, the District Court omits to consider the multiple defenses raised, the resolution of which are patently individualistic and not the subject of class handling:

1. As this record reflects the existence and scope of the recreational concept was disclosed to purchasers at the time of sale. Defendant has raised negligence as a defense contending that any purchaser who did not read his deed and examine the public records for recorded encumbrances is barred from any relief.

2. Defendant asserts that purchasers who have used the recreational facility in their section are estopped to accept the benefit of the contract and attempt to vitiate their obligations thereunder.

3. Defendant asserts that payment coupled with actual and constructive knowledge of the purpose of the payment estops relief to such individual purchasers who have so paid.

4. Defendants asserts "Plaintiffs' action is barred by laches as Plaintiffs have had full knowledge of all of the terms of the transaction of which they now complain; have used and enjoyed the property, maintenance arrangements, and recreational facilities and have delayed action to the extent that it would be inequitable to grant the relief sought."

5. Defendant counterclaims for recision of the entire transaction between Defendant and all class members should class procedure be applied:

Counterclaim

Defendant, BEHRING CORPORATION, a Delaware corporation, counterclaims against the Plaintiffs, WILLIAM R. BENNETT, VIRGINIA M. BENNETT, AL A. JURSEK, ROSE J. JURSEK, ALEXANDER J. WAGNER and VICTORIA L. WAGNER, and such other presently unidentified persons as may become Plaintiffs herein, nominally, or as class Plaintiffs, should a class be determined by the Court and alleges:

1. BEHRING CORPORATION, a Delaware corporation, through its predecessor, Behring Properties, Inc., entered into the transaction for the sale of house and lot and other considerations described in the exhibits to Plaintiff's Complaint. The transactions are described in material detail in the exhibits to Plaintiff's Complaint and documents referred to therein which are a matter of public record. Such exhibits are adopted by reference here.

2. The three transactions that are the subject of this litigation at this time represent nondivisible or unitary contracts, all terms and conditions of which were material considerations and inducements to Counter-plaintiff.

3. Absent the provisions for recreational facilities and payment therefor to perpetuate the availability of such facilities, Counterplaintiff would not have sold a house and lot to the Plaintiff, or

would not have sold the house and lot at the price or on the terms that were part and parcel of the entire transaction.

4. Absent the provisions for maintenance facilities and payment therefor to perpetuate the availability of such facilities, Counterplaintiff would not have sold a house and lot to the Plaintiffs, or would not have sold the house and lot at the price or on the terms that were part and parcel of the entire transaction.

5. Plaintiffs now contend that there was no meeting of the minds as to the foregoing material aspects of the transaction and that Plaintiffs should be released from the obligations which attend the recreational and maintenance facilities.

6. Should the Court determine that the recreational and maintenance aspects of the transactions are not binding obligations of the Plaintiffs, there would, in fact, have been no meeting of minds, there would be a failure of consideration and Counterplaintiff's sale to Plaintiffs would have been the result of Plaintiffs' misrepresentation, misunderstanding or mistake.

7. WHEREFORE, BEHRING CORPORATION, a Delaware corporation, urges the Court to enter an Order rescinding the entire transaction between Plaintiffs and Defendant and:

1. Order Defendant to repay the full purchase price to the Plaintiffs or the net equitable interest of Plaintiffs to be paid to Plaintiffs and the balance of such purchase price to mortgagees, if any.

2. Order that the deeds delivered to Plaintiffs are null and void.

3. Order Plaintiffs to vacate the premises within a reasonable time.

4. Order Plaintiffs to pay Defendant the reasonable rental value of house and lot from date of closing to date of vacation.

It is, thus, clear that absent unanimity among all residents in a particular section (and no such allegation is made by these Plaintiffs) antagonistic interests exist as a matter of law.

Further, residents of Section Three, as an example, have no interest whatsoever in the recreational concept or Declarations of Restrictions covering any other section and in no way can adequately represent the interest of other sections. The Bennetts and the Wagners can no more, as putative class representatives, affect the contractual rights of persons who are contractual strangers to them, than a resident of section "X" could sue to enforce compliance with the restrictive covenants by residents of Section Three or Section Five.

Let us assume that all 256 residents of Section Three changed their minds about wanting to live in a subdivision that had a recreational facility and the owner of the facility released all 256 of the Section Three residents from

payment and used his land and building for another purpose. Could a resident of section "X" complain? Could he sue to enforce a covenant to which he was not a party? No. No more so than the Bennetts and Wagners can adequately represent the interests of residents of other sections—or, in point of fact—of residents of Section Three or Five who either:

(a) want the recreational facility, or

(b) are barred from relief by one of the defenses which apply individually.

An examination of the record shows that Plaintiffs' entire position is, in fact, a non sequitur. They seek a selective rescission of two of the many paragraphs of the Declarations of Restrictions. The Bennetts use the recreational facility, pay for its use and do not mind doing so. Their apparent only objection is that in the event of nonpayment a lien subject to foreclosure is an available remedy for the owner of the recreational facility.

Testimony of Mr. Bennett (A. 318)

Q Do you use the clubhouse?
A Very little.

Q How many times have you been there since 1969?
A Where?

Q To the clubhouse in your section.
A Oh, a lot of times I have been there when there is meetings, like that.

Q Do you ever go there for recreation?
A No, can't say I do.

Q Have you been to dances there?
A Yes.

Q Have you been to parties there?
A A couple.

* * *

(A. 326)

Q Yes, sir. Now, the $27.00 a month that you're paying now to an Association to take care of the clubhouse and to cut your lawn, et cetera, is it your understanding that that includes painting of your house?
A We understand it don't.

Q It does not?
A Does not. The contract now with the Association—

Q Is just for your lawn and the clubhouse?
A Right, and the clubhouse.

* * *

(A. 327)

Q Now, let me ask you something. When did you first meet either Mr. Krupnick or Mr. Esler?
A Just when I came to their office.

Q When was that, sir?
A The other day.

Q You mean this week? Have you hired Mr. Esler and Mr. Krupnick to be your lawyers?
A No.

* * *

(A. 330)

Q Have you ever paid any money to Behring Corporation other than the purchase price of the house?
A No.

The Bennetts purport to represent a class of persons, 95% of whom have no contractual interest or obligation in the Section Three recreational hall. The Bennetts pay $27.00 a month to an "Association", use the hall and the swimming pool anytime they want to, yet, through counsel employed by the Tamarac Homeowners Association (not a party to this action) seek to compromise the recreational program of an entire retirement city.

Under Counts III and IV of Plaintiffs' Complaint, they seek specific performance of their purchase contract and damages. They purport to represent all purchasers who executed contracts wherein Defendant agreed to deliver a deed free and clear of all encumbrances. They complain that the deed delivered (and, again, accepted) contained reservations and restrictions relating to the recreational facility, thus an encumbrance.

The same impediments to class procedure apply here, namely:

— Antagonistic interest related to the subsistence of the recreational concept

— A preponderance of issues not common to class members viz:

a) Application of the defense of merger.

b) Estoppel.

c) Unjust enrichment and mitigation of damages proportional to use or right to use the recreational facilities.

d) Laches.

e) Defendant's Counterclaim for rescission of the entire transaction.

There is specific conflict between decisions of this court, decisions of other Court of Appeals, and the decision rendered in the present case by the Fifth Circuit Court of Appeals.

In *Gillespie v. United States Steel Corporation*, 379 U.S. 200 (1964), this court held:

> Under §1291 an appeal may be taken from any "final" order of a district court. But as this Court often has pointed out, a decision "final" within the meaning of §1291 does not necessarily mean the last order possible to be made in a case. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528. And our cases long have recognized that whether a ruling is "final" within the meaning

of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this court has held that the requirement of finality is to be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, supra, 337 U.S. at 546, 69 S.Ct., at 1226. See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510; *Bronson v. La-Crosse & M. Railroad Co.*, 2 Black 524, 531, 17 L.Ed. 347, 359; *Forgay v. Conrad*, 6 How. 201, 203, 12 L.Ed. 404; *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299, pointed out that in deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

Can one imagine the cost of discovering 10,000 separate real estate transactions over many years.

In the case of *Eisen v. Carlisle and Jacqueline, et al.*, 417 U.S. 156 (1974) this court held:

> Restricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy. While the application of §1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future. We know, of course, that §1291 does not limit appellate review to "those final judgments which terminate an action . . ., *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545 (1949), but rather that the requirement of finality is to be given a "practical rather than a technical construction." Id., at 546. The inquiry requires some evaluation of the competing considerations underlying all questions of finality—" the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickerson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (footnote omitted).

As was the case in *Eisen*, the instant case does fall within the small class of cases in which there would be a danger of denying justice if the decision of the District Court and the Court of Appeals is not reviewed by this court. As already pointed out the present case would affect 10,000 separate real estate transactions with a potential monetary impact in excess of $60,000,000.00. See also *Cohen v. Beneficial Loan Corporation* 337 U.S. 541 (1949).

In the case of *Parkinson v. April Industries* 520 F.2d 650 (2d Cir. 1975). The Defendants appealed an order of the District Court which authorized the Plaintiffs to proceed as representatives of a class in a class action. The court denied review but went on to hold that review would be granted if three requirements were affirmatively satisfied. These requirements were:

(1) whether the class action determination is "fundamental to the further conduct of the case";

(2) whether review of that order is "separable from the merits",

(3) whether the order will cause "irreparable harm to the defendant in terms of time and money spent in defending a huge class action".

As already shown, the present case does satisfy all three of these requirements and should be granted review. See also *Ott v. Speedwriting Publishing Co., and ITT* 518 F.2d 1143 (6th Cir. 1975).

In *Herbst v. International Telephone and Telegraph Co.* 495 F.2d 1308 (2d Cir. 1974) the court held that:

Here the defendant is appealing from an order holding that a class action can be maintained. Our most recent statement on whether such an order is appealable is found in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.) cert. granted, 414 U.S. 908, 94 S.Ct. 235, 38 L.Ed. 2d 146 (1973) (Eisen III).

Building on Judge Friendly's concurring opinion in Korn I, supra, 443 F.2d at 1307, in which he suggested that the court might wish to consider a rule that would "afford equality of treatment as between plaintiffs and defendants," we said that the district court's order allowing a class action to be maintained is appealable. 479 F.2d at 1007 n.l.

In so saying we relied on Supreme Court cases that have given 28 U.S.C. §1291 a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). See also *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963). We stated that an order authorizing a class action is appealable under Cohen because

[it] clearly involves issues "fundamental to the further conduct of the case;" . . .

[and] is also separable from the merits of the case; and [the] irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident.

Although other courts of appeals have held that orders authorizing class actions are not appealable, we believe that Eisen III reached the correct result and we adhere to it. This circuit has probably been plagued by more class actions than any other circuit. As of June 30, 1973 there were 679 class actions pending in this circuit. Only the Fifth Circuit had more and most of its class actions were civil rights suits which usually seek injunctive relief and are easier to manage. Administrative Office of the United States Courts, 1973 Annual Report of the Director, table 36, at II-44 to -45. The Southern District of New York alone had 523 class actions pending in all

districts. Id. at II-42. We believe that immediate review of orders authorizing class actions will aid the districts courts in disposing of these cases and promote the sound administration of justice.

As in *Herbst*, immediate review of the order certifying the class in the instant case would aid the District Court in disposing of this case and would promote the sound administration of justice. See also *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974), *General Motors Corp., v. The City of New York* 501 F.2d 639 (2d Cir. 1974).

In *Cessna Aircraft Distributorship Anti-Trust Litigation v. Cessna* 518 F.2d 213 (8th Cir. 1975) the court recognized that an order certifying class may be a "final decision" under 28 U.S.C. §1291 when that order falls within the small class of decisions which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itsef to require that appellate consideration be deferred until the whose case is adjudicated. It is respectively submitted that the instant case does fall within that small class of decisions in that the rights asserted are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred.

Thus, Petitioners assert that certiorari should be granted and that this court should review the decision of the Fifth Circuit Court of Appeals as being in conflict with the decisions of this court and of decisions of other courts of appeals on the matter of jurisdiction to review a certain category of class action orders.

CONCLUSION

As orders denying class action status are reviewable, "equality of treatment as between plaintiffs and defendants" requires that review for defendants must be at least possible in at least a small category of class action cases. A categorical rejection of jurisdiction by a court of appeals in all cases condemns defendants to the confiscatory inertia of class procedure, when in extreme cases, that prejudice could be avoided by early review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief of Appellant was mailed to JON KRUPNICK, Attorney for Appellees, 1818 First National Bank Building, One Financial Plaza, Fort Lauderdale, Florida this ____ day of March, 1976.

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_____
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APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 72-886-CIV-NCR

WILLIAM R. BENNETT, et al.,

Plaintiffs,

Vs.

BEHRING CORPORATION,
a Delaware corporation,

Defendant.

[Filed July 3, 1974]

ORDER

Plaintiff representatives of homeowners in the City of Tamarac have brought this diversity class action alleging, under various legal theories, that certain deed restrictions filed by defendant developer are invalid because of defendant's fraudulent misrepresentations; because they constitute unreasonable restraints on alienation; and because the restrictions are in breach of contract as to a certain subclass of purchasers. The class representatives seek alternative equitable or legal relief.

Count I and Count VI are based on common law fraud; Count II attacks the legality of the deed restrictions because the restrictions require affirmative acts of the purchasers and because of its effect on alienation. Counts III and IV are based on defendant's alleged breach of contract in failing to convey title free and clear of all

encumbrances as covenanted. Count V, based on 15 U.S.C. §1711, has been stricken by court order dated October 3, 1973 because none of the remaining named plaintiffs were representatives of the subclass. Plaintiffs seek a determination of class pursuant to Rule 23, F.R.C.P. and a severance of Counts III and IV for purposes of trial pursuant to Rule 42(b), F.R.C.P.

Counts I and VI are solely based on allegations of common law fraud and as to these two counts the court determines that a class action cannot be maintained. Although plaintiffs apparently meet all requirements of Rule 23(a), the court finds that plaintiffs fail to meet any of the alternative three requirements under Rule 23(b). Plaintiffs do not seriously contend that they could satisfy 23(b)(2) which requires that appropriate final relief relate predominantly to injunctive or declaratory relief rather than to money damages. See *Contract Buyers League v. F & F Investment*, 48 F.R.D. 7 (N.D. Ill. 1969); Advisory Committee's Note, 39 F.R.D. 69, 102 (1966).

The court must further reject the possibility of certification under 23(b)(1)(A) or (B) because that section should be "confined to those causes of action in which there is a total absense of individual issues." *Tober v. Charnita*, 58 F.R.D. 74, (M.D. Pa. 1973). The standard for maintenance under Rule 23(b)(1) is more rigid than the standard for class certification under Rule 23(b)(3) and the court must examine the allegations of the complaint carefully since once the class is determined under either Rule 23(b)(1) or (b)(2), prospective class members cannot opt out.

Where different results as to adjudications involving different individuals could be distinguished on the basis of different facts, the need to meet the threat of inconsistent adjudications, which is the thrust of Rule 23(b)(1), is insubstantial. See *Contract Buyers League v. F & F Investment, supra*, at 14. Since the court does not find that the plaintiffs have met their burden of proving a class under the less rigid standard of Rule 23(b)(3), it is clear that plaintiffs could not maintain a 23(b)(1) class action where individual issues abound.

The court further finds that with respect to considerations under Rule 23(b)(3), common questions of law or fact do not predominate over individual questions of fact and that a class action is not a superior method for a fair and *efficient* adjudication of the controversy based on common law fraud. An examination of the allegations of the complaint and portions of the deposition of the Bennetts discloses that the factors inherent in the relationship between purchaser and salesperson involved in the various home purchase transactions must of necessity have varied from individual to individual especially in the absence of a dominant, standardized representation.

The court examines the deposition of the Bennetts, not to forecast the merits of the controversy, but in order to determine more accurately whether the issues are principally individual in nature or susceptible of proof equally applicable to all class members. See *Miller v. Mackey International* 452 F.2d 424, 427, (5th Cir. 1971); *Abercrombie v. Lum's Inc.*, 345 F.Supp. 387, 390 (S.D. Fla. 1972). For example Paragraph 16 of the complaint alleges fraud arising from the failure of defendant's agents to mention the amount plaintiffs would be obigated to pay

for rental of the recreational facilities; however, the deposition of the Bennetts reveals that Mr. Bennett understood that the $33.00 monthly charge was "for everything" including the use of the clubhouse. Moreover, certain of the form contracts signed by plaintiffs specify the amount of monthly charge for maintenance and recreational charges. Paragraph 17 states that defendant fraudulently misrepresented that the payments were for the purchase of the clubhouse; yet, from the deposition of the Bennetts it appears that the Bennetts were not told that the monthly charges were purchase payments. These variations between deposition answers and allegations in the complaint are noted in order to indicate the potential magnitude of the factual variations between thousands of homeowners as to what each homeowner was told or not told by a Behring salesperson over a series of individual meetings; what each homeowner understood the nature of his or her individual obligation to be; and the extent that each individual homeowner relied on the misrepresentations or omissions in the purchase of his or her home.

In an action for common law fraud, under the law of Florida the elements of proof include: a false statement of fact by defendant; that the statement was made to induce plaintiff to act in reliance; an action by plaintiff in reliance thereon. See *Tonkovich v. South Florida Citrus Industries* 185 So.2d 710 (Fla. App. 1966); *Entron, Inc. v. General Cablevision of Palatka*, 435 F.2d 995 (5th Cir. 1970).

Based on the alleged facts and law applicable to Counts I and VI the court is faced with a situation where there is an absence of standardized written communications as common representations and where the element

of reliance must be proved for each individual homeowner. As noted in *Simon v. Merrill, Lynch, Pierce, Fenner and Smith*, 482 F.2d 880 (5th Cir. 1973), where class action status was denied because of an absence of standardized written communications and a predominance of oral representations:

> If there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment as a class action. *Id.* at 882, *citing* Advisory Committee's Note, 39 F.R.D. 98, 107 (1966).

Where standardized representations such as those contained in a written prospectus for the sale of securities or standardized written agreements between franchisees and franchisors exist and provide the predominant factual issue in the case, the courts have ordinarily allowed class actions. See *Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. (1972); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968); *Siegel v. Chicken Delight*, 271 F.Supp. 722 (N.D. Calif. 1967). However, where oral rather than written misrepresentations are the subject of the action or where individual elements of coercion or reliance predominate, class action status will be denied. See *Simon v. Merrill, Lynch, supra; National Auto Brokers v. General Motors Corp.* 60 F.R.D. 476 (S.D.N.Y. 1973); *Abercrombie v. Lums, supra; Moscarelli v. Stamm*, 288 F.Supp. 453 (E.D.N.Y. 1968). "Although having some common similarities, the face to face oral misrepresentations are individualized and susceptible of material variations . . ." *Moscarelli v. Stamm, supra* at 462.

In addition to the problem of the variety of oral representations the court finds the problem of individual proof of reliance to be insurmountable and that the problem makes the class action device less desirable than other methods for the fair and efficient adjudication of the controversy. Although one Court of Appeal has suggested the possibility of separate trials on the issue of reliance, see *Green v. Wolf Corp. supra*, this suggestion arose in the context of a federal securities case where the element of reliance does not have the same significance as in a common law fraud case. As a lower court noted in dismissing a class action count based on common law fraud connected with land sale:

> We firmly believe that the process of individual trials with regard to reliance by several thousand people is untenable and will result in an unmanageable and unduly time-consuming procedure . . . [To eliminate the element of reliance] would not only subvert the principles of law involved, but would merely achieve economies of time at the expense of procedural fairness." *Tober v. Charnita*, 58 F.R.D. 74 (M.D.Pa. 1973)

The court obviously rejected the notion that proof of individual reliance was no longer a required element of common law and deceit. See also, *Hoffman v. Charnita*, 58 F.R.D. 86 (M.D.Pa. 1973). Thus the existence of the requirement of individual proof of reliance and the wide variety of oral and written representations in each transaction compels the court to reject the maintenance of a class action as to all elements of common law fraud.

The court specifically finds that the allegations in Count II as to the legality of the deed restrictions (Paragraphs 22, 23, 24, 25) constitute a Rule 23(b)(3) class action as to the particular legal issues presented and that the allegations of contract breach in Counts III and IV constitute an appropriate subclass under Rule 23(b)(3) of which the Bennetts are proper class representatives. The court also finds that a trial of the issues under Count III and Count IV may be separated from a trial of the specified issues under Count II.

The court has determined that pursuant to Rule 23 (a)(1) the class under Count II and the subclass under Counts III and IV are so numerous that joinder of all members is impracticable. The number of Tamarac homeowners are approximately 10,000 and all homeowners are potentially class members under Count II. Although the court is unaware of the number of homeowners constituting the subclass of all those who received contracts promising to convey title free and clear of all encumbrances, the court at this time assumes that the number exceeds fifty so that joinder of all parties would be impracticable. Cf., *Moscarelli v. Stamm*, *supra* at 463. Under 23(a)(2), the court finds that there are questions of law or fact common to the class. These questions in common predominate over any individual questions of fact. Under Count II, the claim that the deed restrictions are void because of the affirmative nature of the obligations and because of the restraints on alienation is a legal question common to every homeowner in Tamarac who has a similar Declaration of Restriction as an encumbrance on his or her title. Under Count III and the alternative Count IV, the common questions involving contract construction pre-

dominate. In addition, the defendant's defense of merger are defenses that could be raised against any member of the subclass.

Finally the court finds under 23(a)(3) and (4) that the plaintiffs are proper class representatives and that the Bennetts are proper subclass representatives as each named plaintiff is currently a homeowner in Tamarac possessing title with the encumbrances complained of and that each named plaintiff is the original purchaser of the subject property. The Bennetts as subclass representatives were recipients of the form contract providing for the delivery of a warranty deed "free and clear" of all encumbrances.

Therefore, for the foregoing reasons it is

ORDERED AND ADJUDGED that:

1. The allegations of common law fraud contained in Counts I and VI of the complaint cannot be maintained as a class action under Rule 23, F.R.C.P. and the motion for determination of class is denied as to those counts.

2. A class action under Rule 23(b)(3) as to the allegations contained in paragraphs 22, 23, 24 and 25 of Count II is hereby certified as to the issues contained therein and the class is defined as:

> All those persons who reside, or will in the future reside within the corporate limits of the City of Tamarac, Broward County, Florida, and who have purchased, or will in the future purchase property located in the City of Tamarac from the

> Defendant BEHRING CORPORATION, or who are or will be obligated to make any payments under any Declarations of Restrictions which have been filed by the Defendant BEHRING CORPORATION, or its subsidiaries and which purport to apply to properties located within the corporate limits of the City of Tamarac.

3. A subclass under Rule 23(b)(3) is hereby certified as to Counts III and IV of the complaint and the subclass is defined as:

> All those persons who reside within the corporate limits of the City of Tamarac, Broward County, Florida, and who have purchased property from the Defendant, Behring Corporation and who entered a contract with the defendant containing a covenant to supply the purchaser with a "warranty deed conveying title free and clear of all encumbrances."

4. The motion for a separate trial as to Counts III and IV is hereby granted.

5. The plaintiff is directed pursuant to Rule 23(c)(2) to submit to the court for approval a proposed form of notice to the class and proposed method of effecting notice to fulfill the requirements of Rule 23(c)(2) and the recent dictates of the Supreme Court in Eisen v. Carlisle, 42 LW 4804 (May 28, 1974) designed to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable

effort." Plaintiff shall submit the proposed notice and proposed method of notice within forty-five (45) days of the date of this order.

DONE AND ORDERED this 3d day of July 1974.

NORMAN C. ROETTGER, JR.
United States District Court Judge

CC: Jon E. Krupnick Esq.
WALSH, DOLAN & KRUPNICK
Robert Moriner Esq.
and
Gilbert A. Haddad
PREDDY, HADDAD, KUTNER & HARDY

United States Court of Appeals, Fifth Circuit.

No. 74-3055.

William R. BENNETT et al.,
Plaintiffs-Appellees,
v.

BEHRING CORPORATION, a Delaware Corporation,
Defendant-Appellant.

Jan. 16, 1976.

[CORRECTED]

A real estate developer appealed from an order of the United States District Court for the Southern District of Florida, at Fort Lauderdale, Norman C. Roettger, Jr., J., granting class action certification under certain counts of a complaint against it and defining the appropriate class and subclass. The Court of Appeals held that the order was not a final appealable order.

Appeal dismissed.

Courts —405(12.7)

Order granting class action certification and defining appropriate class and subclass was not final appealable order. 28 U.S.C.A. § 1291.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

PER CURIAM:

Appellant Behring Corporation, a real estate developer, appeals from an order of the district court granting class action certification under certain counts of a complaint against it, and defining the appropriate class and subclass. The district court denied appellant's motion for certification pursuant to 28 U.S.C. § 1292(b), and appellant now seeks to appeal under 28 U.S.C. § 1291.

We have carefully considered the briefs, record, and contentions of the parties on oral argument. It is our conclusion that the order entered by the district court is not a final appealable order under § 1291 and that the appeal should be dismissed. *See, e. g., Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975); *Seiffer v. Topsy's International, Inc.*, 520 F.2d 795 (10th Cir. 1974); *In re Cessna Aircraft Distributorship Antitrust Litigation, White Industries, Inc. v. Cessna Aircraft Co.*, 518 F.2d 213 (8th Cir. 1975); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974); *Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972); *Walsh v. City of Detroit*, 412 F.2d 226 (6th Cir. 1969).

Appeal dismissed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-3055

D. C. Docket No. FL-72-886-CA
WILLIAM R. BENNETT, ET AL.,
Plaintiffs-Appellees,

versus

BEHRING CORPORATION, a Delware Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

January 16, 1976

Issued as Mandate:

IN THE
SUPREME COURT OF
THE UNITED STATES

CASE NO.

BEHRING CORPORATION, a Delaware corporation,
Petitioners, Appellant

vs.

WILLIAM R. BENNETT, et al.
Respondents, Appellee

NOTICE OF APPEAL

PREDDY, HADDAD, KUTNER,
HARDY & JOSEPHS, P.A.
Attorneys for Petitioners/
Appellants
5th Floor Concord Building
Miami, Florida 33130

GILBERT HADDAD, ESQ.

COMES NOW, BEHRING CORPORATION, a Delaware corporation, Petitioner named above, by and through its undersigned attorneys, and respectfully presents this, its Notice of Appeal.

The Petitioner is appealing the Judgment of the United States Court of Appeals for the Fifth Circuit entered on January 16, 1976.

Petitioner is appealing pursuant to 28 USC Section 1254; 28 USC Section 2101(c); and Supreme Court of the United States, Revised Rules effective July 1, 1970, Rule 19(1)(b); Rule 21; Rule 22(3).

WE HEREBY CERTIFY that a true copy of the foregoing was mailed to JON KRUPNICK, Attorney for Respondents, Appellees, One Financial Plaza, Fort Lauderdale, Florida, this 12th day of March, 1976.

PREDDY, HADDAD, KUTNER,
HARDY & JOSEPHS, P.A.
Attorneys for Petitioners/
Appellants
5th Floor Concord Building
Miami, Florida 33130

By GILBERT A. HADDAD